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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CLIFTON L. GOODRICH,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in departing from the traditional use of a market rate standard under virtually all other fee-authorizing statutes and adopting, instead, a cost-based approach for attorney's fees awards under the Civil Service Reform Act to non-profit labor and public interest organizations?

2. Whether, as found below, it is unethical to award market value attorney's fees to full-time salaried counsel of a non-profit labor or public interest organization where the fees are to be used solely for payment of litigation expenses? *

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* The petitioner, Clifton L. Goodrich, was represented in the Courts of Appeals for the Third Circuit and Federal Circuit by counsel employed by the American Federation of Government Employees, AFL-CIO (AFGE), a non-profit labor organization which, as the employer of the counsel for whose services the fees at issue were sought, has an interest in this matter. The United States Merit Systems Protection Board is the administrative authority which originally limited the attorney's fees award herein to the actual cost to AFGE of providing legal services.

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CLIFTON L. GOODRICH,
Petitioner,

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DEPARTMENT OF THE NAVY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PRELIMINARY STATEMENT

Petitioner Clifton L. Goodrich prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is not yet reported. The decision of the United States Merit Systems Protection Board (App., *infra*, 7a-21a) is also not reported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 22a) was entered on May 9, 1984. A petition for re-

hearing with a suggestion that the case be reheard *en banc* was denied on July 12, 1984 (App., *infra*, 23a). This petition for a writ of certiorari was filed on October 10, 1984, within 90 days of the denial of the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves § 205 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. § 7701 *et seq.* (1982), and particularly 5 U.S.C. § 7701 (g), which reads as follows:

> (g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee, as the case may be, determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.
>
> (2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

5 U.S.C. § 7701(g) (1982).

STATEMENT

1. The case at bar arises from an appeal in 1980 to the United States Merit Systems Protection Board (MSPB),

challenging the Navy's reduction-in-grade of petitioner's federal civil service position. The MSPB dismissed the appeal for lack of jurisdiction.

Petitioner appealed to the United States Court of Appeals for the Third Circuit, proceeding *pro se* until after briefing had been concluded and then retaining counsel, through his union. The court of appeals granted leave for counsel to file a supplemental brief on behalf of petitioner, and specifically requested that the brief address the effect of the then recent decision in *Atwell v. MSPB*, 670 F.2d 272 (D.C. Cir. 1981), which appeared to determine a jurisdictional issue identical to that before the court. *See Goodrich v. Department of the Navy*, 686 F.2d 169, 171 n.6 (3rd Cir. 1982). A supplemental brief was subsequently filed by counsel, who had also represented petitioners Atwell *et al.* in *Atwell, supra.*

The court of appeals vacated the MSPB's order denying jurisdiction, since it appeared to the court that petitioner had been downgraded due "to an erosion away from his position of supervisory and other responsibilities. . . ." *Goodrich, supra*, 686 F.2d at 175. This fact, as the supplemental brief had argued, distinguished the *Atwell* case sufficiently from petitioner's circumstances to dictate a result contrary to the *Atwell* court's affirmance of the MSPB's denial of jurisdiction. *Id.* The Third Circuit remanded petitioner's appeal to the MSPB for a hearing and decision on the issue of whether petitioner's downgrade had been due to a gradual erosion of his duties or reorganization, either of which would necessitate reduction-in-force procedures in removing him from his competitive level by demotion.

After a hearing on remand, the MSPB expressly found that, when petitioner was downgraded in 1980, his duties had gradually eroded over a period of years or, alternatively, and to like result, that his former WS-5 position was abolished due to a reorganization. Petitioner's

reduction-in-grade was cancelled. *Goodrich v. Navy*, MSPB No. NY03518090128 (Feb. 8, 1983).

2. Upon petitioner's application for attorney's fees, the MSPB awarded fees based upon the actual cost to petitioner's union of providing legal services, rather than on the basis of the $75.00 per hour market value rate sought by petitioner. *Goodrich v. Navy*, MSPB No. NY03518090128ADD (June 3, 1983) (App., *infra*, 7a-21a). Notwithstanding the deposit of the awarded fees into a special Legal Representation Fund maintained separately from the union-employer's general revenues and used only for the costs of the legal representation of members, the MSPB determined that its earlier decision in *Wells v. Schweiker*, MSPB No. HQ120500017, 83 FMSR 7053 (Dec. 6, 1982), was controlling (*id.* at 13a-14a). Thus, quoting *Wells*, the MSPB held that when a salaried union attorney rendered the professional services in question, the fees should be measured by a "salary-plus-overhead" or "cost-plus" formula, because a "market value" approach "would provide payment to the union for the unauthorized practice of law."[1] *Id.* at 13a, quoting *Wells v. Schweiker*, *supra*, at 6, 9 (citing *National Treasury Employees Union v. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981)).

3. Upon appeal pursuant to 5 U.S.C. § 7703(b)(1) (1982), the court of appeals held that the MSPB had not "committed legal error or abused its discretion in limiting the attorney's fee awarded to the expenses the union incurred in providing services." App., *infra*, 6a. Addressing petitioner's contention that the placement of

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[1] The application of the "salary-plus-overhead" or "cost-plus" formula relies upon the hourly wage at which the union compensates its attorneys for time devoted to the case, plus overhead. The MSPB had determined in an earlier case that, when a salaried union attorney turns his or her fee award over to the union, the amount of overhead expenses incurred would be recognized as equivalent to 100 percent of the compensation for the attorney's professional services. *See Gaston Powell, Jr. v. Dept. of the Treasury*, 8 MSPB 21, 30 (1981).

fees in the Legal Representation Fund obviates the ethical consideration on which use of the "cost-plus" formula is premised, the court of appeals stated:

> At least to the extent the union uses its general funds to pay for the legal services it furnishes to its members, the vice the court of appeals in *Treasury Employees* and the Board in *Powell* found in the payment to the union of a fee based upon the market value of the attorney's services also would exist in such payment under the present fund arrangement. By reducing the amount of its general funds the union is required to use to provide legal services, the payment to the fund of legal fees that exceed the union's expenses of providing the services would result in the union's indirectly utilizing legal fees for its ordinary expenses.

App., *infra*, 5a-6a.

The Supreme Court's decision in *Blum v. Stenson*, —— U.S. ——, 104 S.Ct. 1541 (1984), issued after argument in the case at bar, was characterized by the court of appeals as inapposite "because the entire [market value] fee in that case went to a nonprofit law office, the Legal Aid Society of New York [whereas] [i]n the present case . . . part of the fee would inure to the benefit of a nonlegal organization, the union. . . ." The court of appeals further distinguished *Blum* from the instant case on the ground that *Blum* involved a civil rights statute, while "no comparable public policy [exists] to encourage the bringing of suit by federal employees challenging adverse personnel actions against them." *Id.* at 6a.

ARGUMENT

This case presents a question of paramount significance for the operation of the comprehensive scheme for protecting federal employees' rights established by Congress in the Civil Service Reform Act of 1978 (hereinafter "Reform Act"). The court of appeals' decision both (1) contradicts the intent of Congress in the Reform Act that

"reasonable attorney fees" under 5 U.S.C. § 7701(g) are to be calculated according to the prevailing market rates in the relevant community, regardless of whether a plaintiff is represented by private counsel or nonprofit union counsel, and (2) erroneously declares that what is an established ethical practice under all other federal fee statutes is unethical for non-profit organization counsel under the Reform Act. The inevitable consequence of the petitioned-from ruling is to undermine a major purpose of the Act—the protection of federal employees from prohibited personnel practices and agency violations of merit system principles—by reducing the litigation resources available to federal employee unions, who play a major role in the representation of employees in actions to challenge such practices and violations.[2] Review by this Court, moreover, would resolve the conflict between the petitioned-from decision and contrary awards by another panel of this court of appeals and by another court of appeals.

1. The Reform Act, 5 U.S.C. § 7701(g)(1), provides that the MSPB may award "reasonable attorney fees" to the "prevailing party" if "payment by the agency is warranted in the interest of justice." Section 7701(g)(2) states that in cases where "the decision is based on a finding of discrimination prohibited under section 2302(b)(1), the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k))."

Neither the above-quoted language nor any other language in the Reform Act suggests even remotely that Congress intended in the fee authorizing section to depart from the traditional and well-established use of market value rates in calculating fees for private counsel

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[2] Under 5 U.S.C. § 7703(b)(1), as amended by Pub.L. No. 97-164, Title I, § 144, 96 Stat. 45 (1982), a petition to review a final MSPB decision is filed in the United States Court of Appeals for the Federal Circuit. The petitioned-from decision, thus, governs all MSPB fee awards.

and non-profit union counsel alike. Congress elsewhere in the Reform Act stated its express finding that "labor organizations and collective bargaining are in the public interest." 5 U.S.C. § 7101(a). Since Congress clearly defined in Title VII of the Reform Act—the Federal Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.*—the prominent and strengthened role of federal employee unions in the Reform Act's scheme,[3] it is inconceivable that Congress did not expressly state its intent to treat fee awards for the legal services of such organizations differently than awards to private counsel, if such was Congress' intent. Instead, Congress employs in § 7701(g) the phrases "reasonable attorney fees" and "prevailing party," which are used in other fee statutes and are uniformly interpreted as allowing market rate fees to counsel of non-profit organizations, regardless of actual cost. *See, e.g., Blum v. Stenson, supra* (Market value fees awarded to the Legal Aid Society of New York under Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988); *Devine v. Sutermeister*, 733 F.2d 892 (Fed. Cir. 1984) (Market value fees awarded National Treasury Employees Union under the Equal Access to Justice Act, 28 U.S.C. § 2412); *Hall v. Merit Systems Protection Board*, No. 81-7727 (9th Cir. Nov. 3, 1983) (Order granting award of market value fees to counsel for the American Federation of Government Employees, AFL-CIO, under the Back Pay Act, 5 U.S.C. § 5596); *Crawford v. American Federation of Government Employees, AFL-CIO*, 576 F. Supp. 812 (D.D.C. 1983) (Market value fees awarded union counsel under Federal Rule of Civil Procedure 37(b) and (d)); *Jordan v. Department of Justice*, 691 F.2d 514 (D.C. Cir.

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[3] *See e.g., Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority*, —— U.S. ——, 104 S.Ct. 439 (1983) [hereinafter "*BATF*"] ("The new Act . . . significantly strengthened the position of public employee unions. . . ." 104 S.Ct. at 441. "In passing the Civil Service Reform Act, Congress unquestionably intended to strengthen the position of federal unions. . . ." *Id.* at 449).

1982) (Institute for Legal Studies awarded market value fees under Freedom of Information Act, 5 U.S.C. § 552); *Ferris v. Internal Revenue Service*, C.A. No. 81-0383 (D.D.C. Aug. 23, 1982) (Market value fees awarded to union counsel under Freedom of Information Act, 5 U.S.C. § 552); *Johnson v. Department of the Treasury*, No. SA-77-CA-5 (W.D.Tex. September 24, 1981) (Market value fees awarded union counsel under the Privacy Act, 5 U.S.C. § 552a), *remanded on other grounds*, 700 F.2d 971 (5th Cir. 1983) (remanded to determine amount of actual damages); *Torres v. Sachs*, 538 F.2d 10 (2nd Cir. 1976) (Market value fees awarded the Puerto Rican Legal Defense & Education Fund, Inc. under the Voting Rights Act of 1965, 42 U.S.C. § 1973 1(e)); and *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974) (American Civil Liberties Union awarded market value fees under the Civil Rights Act, 42 U.S.C. § 1983).

In view of the afore-cited uniformity in interpreting the language employed by Congress, it is highly pertinent, furthermore, that Congress expressly authorized fees in § 7701(g)(1) only when warranted "in the interest of justice," but in § 7701(g)(2) authorized the payment of attorney fees to a prevailing party in discrimination cases "in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. section 2000e-5(k))," without the "interest of justice" requirement.[4] Since the clear language of *both* § 7701(g)(1) and 42 U.S.C. § 2000e-5(k) authorizes an award of a "reasonable attorney's fee" to a "prevailing party," it is *only* the "interest of justice" standard which differentiates awards under § 7701(g)(1) from awards under 42 U.S.C. § 2000e-5(k). Because awards under the Civil

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[4] 42 U.S.C. § 2000e-5(k) reads:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Rights Act are always based upon market value, as *Blum* evinces (104 S.Ct. at 1546 n.10), Congress intended § 7701(g)(1) awards to be at market value. The legislative history of § 7701(g) of the Reform Act confirms this conclusion in that no distinction between subsections (1) and (2) of § 7701(g), other than the "interest of justice" standard, is addressed anywhere by Congress.

Section 7701(g) evolved from the original Administration proposal, which called for a narrow standard, authorizing fee awards only when "warranted on the grounds that the agency' action was wholly without basis in fact or law," and not proposing a separate standard for discrimination cases. Section 205 of H.R. 11280 as introduced March 3, 1978, 95th Cong., 2d Sess., *reprinted in* House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Civil Service Reform Act*, at 22 (Comm. Print No. 96-2 (1979)) [hereinafter "*Legislative History*"]. Both the House Committee and the Senate Committee broadened this standard.

The House Committee reported, and the full House passed, a bill (H.R. 11280) authorizing "reasonable attorney fees" in non-discrimination cases when "warranted," without qualification, and in discrimination cases in accordance with Civil Rights Act standards. *Legislative History*, *supra*, at 1174. The report accompanying the House bill contained no further discussion of either the term "reasonable attorney fees" or the standards, but, significantly, adopted the cost estimate prepared by the Congressional Budget Office for the bill, which assessed an identical basis for the calculation of fees in discrimination and non-discrimination cases. H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 23, 91 (1978), *reprinted in Legislative History*, *supra*, at 660, 728.

The Senate Committee reported, and the full Senate passed, a bill (S.2640) authorizing "reasonable attorney fees" when "warranted on the grounds that the agency's action was taken in bad faith," and in discrimination

cases in accordance with Civil Rights Act standards. *Legislative History*, *supra*, at 1762. The report accompanying the Senate bill explains the term "bad faith," but does not discuss the term "reasonable attorney fees" except to note that "[t]he section preserves the right of the Board to award attorney fees under this different standard [§ 7701(g)(2)] whenever it finds the employee's rights under the laws prohibiting discrimination have been violated." S.Rep. No. 95-969, 95th Cong., 2d Sess. 60-61 (1978), *reprinted in Legislative History*, *supra*, at 1524-25.

The difference between the open-ended House version and the narrower Senate "bad faith" version was resolved in conference, producing the "warranted in the interest of justice" standard of § 7701(g)(1), as enacted, for non-discrimination cases and the language of § 7701(g)(2) awarding fees in discrimination cases under the Civil Rights Act standards. The Conference Committee report commented briefly on the types of agency actions which might merit awards under § 7701(g)(1) but did not discuss the term "reasonable attorney fee" or distinguish awards in discrimination cases from those in non-discrimination cases. H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 142 (1978), *reprinted in Legislative History*, *supra*, at 1984.

The legislative history of the Reform Act's attorney's fees provision, as the above summary demonstrates, is *silent* as to any distinction between subsections (1) and (2) of § 7701(g) *other than* the "interest of justice" standard. The express reference to 42 U.S.C. § 2000e-5(k), viewed in the light of the absence of mention in the statutory language and legislative history of any distinction between fee awards under subsections (1) and (2) (other than the "warranted in the interest of justice" standard), demonstrates conclusively not only that Congress was aware and approved of the attorney's fees standards under the Civil Rights Act but also that Con-

gress intended the reasonable attorney's fees provision of § 7701(g)(1) *otherwise* to be interpreted in the same manner as § 7701(g)(2), in accordance with the Civil Rights Act's standards.

With respect to the § 7701(g)(2) standards, as herein pertinent, this Court recently held that "[t]he statute [Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988] and legislative history establish that 'reasonable fees' under § 1988 are to be calculated according to the prevailing market rate in the relevant community, *regardless of whether plaintiff is represented by private or nonprofit counsel.*" *Blum v. Stenson*, *supra*, 104 S.Ct. at 1547 [emphasis supplied].[5] The Court found that the legislative history of § 1988 "flatly contradicted" the contention that the use of market rates to calculate attorney's fees leads to exorbitant fee awards and provides windfalls to counsel contrary to Congressional intent. *Blum v. Stenson*, *supra*, 104 S.Ct. at 1546-1547. In reaching this determination the Court noted the silence of § 1988 as to use of prevailing market rates in determining fees but concluded that reference in the legislative history to other case law applying the market rate standard established that Congress intended such customary rates to apply, since it was clearly "legislating in light of experience," and "[n]one of the cases decided

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[5] Concerning the relationship of the attorney's fees provisions of 42 U.S.C. § 1988 to the similar provisions of 42 U.S.C. § 2000e-5(k), this Court noted in *Hanrahan v. Hampton*, 446 U.S. 754, 758 n. 4, 100 S.Ct. 1987, 1989 n. 4 (1980) (*per curiam*), that "[t]he provision for counsel fees in § 1988 was patterned upon the attorney's fees provision contained in Title II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k), and § 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973 1(e)." In *Hensley v. Eckerhart*, —— U.S. ——, 103 S.Ct. 1933, 1939 n. 7 (1983), the Court further opined that "[t]he legislative history of § 1988 indicates that Congress intended that 'the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act.' S.Rep. No. 94-1011, p. 4 (1976), U.S. Code Cong. & Admin. News 1976, p. 5912."

at that time had adopted a cost-based approach to calculating fees. Reference to market rate was uniform. [Citations omitted.]" *Id.* at 1546 n.10.

Blum's conclusion and the Court's reliance on legislative history reflect the earlier fees decision in *Hensley v. Eckerhart*, *supra*, where a similar analysis supported the holding that the extent of a plaintiff's success is a crucial factor in determining the proper amount of a § 1988 award. *Hensley*, *supra*, 103 S.Ct. at 1943. As herein relevant, the concurring opinion in *Hensley* stated: "As nearly as possible, market standards should prevail. . . . This means that judges awarding fees must make certain that attorneys are paid the full value that their efforts would receive on the open market . . . by awarding them market-rate fees. . . ." *Id.* at 1947 (Brennan, J., with whom Justices Marshall, Blackmun, and Stevens join, concurring in part and dissenting in part). The Court stated, furthermore, that "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" *Id.* at 1939 n.7.

Although § 7701(g) authorizes an award of fees to a "prevailing party" and would seem, thereby, to fall within the category of statutes interpreted by this Court to mandate market value fees, as in *Blum*, the petitioned-from decision erroneously characterizes *Blum* as inapposite "because the entire [market value] fee in that case went to a nonprofit law office, the Legal Aid Society of New York [whereas] [i]n the present case . . . part of the fee would inure to the benefit of a nonlegal organization, the union. . . ." App., *infra*, 6a. The court of appeals further distinguished *Blum* from the instant case on the ground that *Blum* involved a civil rights statute, while "no comparable public policy [exists] to encourage the bringing of suit by federal employees challenging adverse personnel actions against them." *Id.*

Neither of these bases for distinguishing *Blum* from the instant case is persuasive. The court of appeals cites no authority for its first conclusory supposition that legal services provided by a non-profit lay organization should be treated differently for fee award purposes than services provided by a legal organization. Nor does the court of appeals distinguish or discuss those cases where market rate fees have been awarded to lay entitities under other fee award statutes. *See e.g., Devine v. Sutermeister, supra*; *Hall v. MSPB, supra*; *Crawford v. AFGE, supra*; *Jordan v. Dept. of Justice, supra*; *Ferris v. IRS, supra*; *Johnson v. Dept. of the Treasury, supra*; *Torres v. Sachs, supra*; and *Brandenburger v. Thompson, supra.*

The court of appeals ignored, furthermore, the broad and important remedial purpose of the Reform Act in its assertion that no public policy exists in the case at hand, comparable to that involved in *Blum*, which is furthered by litigation to vindicate employees' rights. Just as the purpose behind any attorney's fee provision—always an exception to the normal rule of allocating expenses—is to promote the enforcement of the statute involved and to advance the public policy underlying the statute, an award of attorney's fees under § 7701(g)(1) furthers the express statutory policy that "Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices. . . ," and that "Federal employees should receive appropriate protection. . . ." Reform Act, § 3, 5 U.S.C. § 1101 note.

Thus, neither the MSPB nor the court of appeals has identified a reason to interpret § 7701(g)(1) more narrowly than identical provisions under other remedial statutes. On the contrary, the Reform Act's language and its legislative history are totally antithetical to the court of appeals' affirmation of less than market value fees in the case at bar.

Where, as here, the role of public employee unions is a prominent and strengthened one in the scheme to effectuate the purposes of the Reform Act, as expressly noted by Congress (5 U.S.C. § 7101 *et seq.*) and previously recognized by this Court (*see BATF*, *supra*, 104 S.Ct. at 441, 449), it is clearly inconsistent with the remedial intent of the Reform Act, as well as with the long term practice under all other fee statutes, to treat union counsel differently from private counsel with respect to § 7701 (g) awards. The inevitable and direct consequence of the court of appeals' decision is to reduce considerably the resources available to federal employee unions for legal actions to protect employees from prohibited personnel practices and from violations of merit system principles.

2. The history of attorney's fee awards under other attorney's fee statutes establishes, contrary to the court of appeals' decision, that there is no ethical problem in paying market value fees to lay organizations, so long as such fees are used solely for litigation purposes. In this regard the vast majority of attorney's fees awards under other statutes fail to even consider any ethical problems in awarding market value fees where a lay organization, such as AFGE in the case at bar, will benefit indirectly. Organizations ranging from unions[6] to legal defense and education funds,[7] and from ad hoc or special project

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[6] *E.g.*, *Devine v. Sutermeister*, *supra*; *Crawford v. AFGE*, *supra*; *Schwabenbauer v. Board of Education*, 515 F.Supp. 33 (W.D. N.Y. 1983) (New York State United Teachers); and *AFGE v. Rosen*, 418 F.Supp. 205 (N.D. Ill. 1976).

[7] *E.g.*, *Environmental Defense Fund, Inc. v. EPA*, 672 F.2d 42 (D.C. Cir. 1982); *Torres v. Sachs*, *supra* (Puerto Rican Legal Defense and Education Fund, Inc.); *Keyes v. School District No. 1*, 439 F.Supp. 393 (D. Colo. 1977) (Mexican-American Legal Defense and Education Fund); *ASPIRA of New York, Inc. v. Board of Education*, 65 F.R.D. 541 (S.D.N.Y. 1975) (P.R.L.D. and Ed. Fund).

groups [8] to the American Civil Liberties Union (ACLU) [9] and the NAACP [10] have benefitted indirectly from fee awards, in the same manner as AFGE herein, without ethical problems. *See Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974) ("[A]llowable fees and expenses may not be reduced because appellant's attorney was employed or funded by a civil rights organization and/or tax exempt foundation [such as the Ford Foundation] or

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[8] *E.g., Sierra Club v. Gorsuch*, 684 F.2d 972 (D.C. Cir. 1982) (Sierra Club and Environmental Defense Fund), *rev'd on other grounds*, —— U.S. ——, 103 S.Ct. 3274 (1983); *Nat'l Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982) (Corporate Accountability Research Group); *Mary and Crystal v. Ramsden*, 635 F.2d 590 (7th Cir. 1980) (Youth Policy and Law Center, Inc.); *Palmigiano v. Garrahy*, 616 F.2d 598 (1st Cir. 1980) (Nat'l Prison Project), *cert. denied*, 449 U.S. 839; *Thompson v. Madison County Board of Education*, 496 F.2d 682 (5th Cir. 1974) (unspecified subsidized agency); *Allen v. Terminal Transport Co.*, 486 F.Supp. 1195 (N.D. Ga. 1980) (Washington Research Project), *aff'd*, 638 F.2d 1232, *cert. denied*, 455 U.S. 989 (1982); *Consumers Union of United States, Inc. v. Board of Governors of Federal Reserve System*, 410 F.Supp. 63 (D.D.C. 1975).

[9] *E.g., Love v. Mayor*, 620 F.2d 235 (10th Cir. 1980) (ACLU); *Palmigiano v. Garrahy, supra* (ACLU); *Tillman v. Wheaton-Haven Recreation Ass'n*, 517 F.2d 1141 (4th Cir. 1975) (ACLU); *Brandenburger v. Thompson, supra* (ACLU); *Unemployed Workers Organizing Committee v. Batterton*, 477 F.Supp. 509 (D.Md. 1979) (ACLU Baltimore); *Kulkarni v. Nyquist*, 446 F.Supp. 1274 (N.D. N.Y. 1977) (N.Y. CLU); *Howard v. Phelps*, 443 F.Supp. 374 (E.D.La. 1978) (ACLU).

[10] *E.g., New York Gaslight Club, Inc. v. Carey*, 447 U.S. 52 (1980) (NAACP Contribution Fund); *NAACP v. Bell*, 448 F.Supp. 1164 (D.D.C. 1978), *rev'd on other grounds*, 609 F.2d 514 (1979); *See also, Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268 (6th Cir. 1983) (NAACP Legal Defense Fund); *Reynolds v. Coomey*, 567 F.2d 1166 (1st Cir. 1978) (NAACP LDF); *Harkless v. Sweeney Independent School District*, 466 F.Supp. 457 (S.D. Tx. 1978), *aff'd*, 608 F.2d 594 (5th Cir. 1979) (NAACP LDF); *Keyes v. School District No. 1, supra* (NAACP LDF); *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975) (NAACP LDF).

because the attorney does not exact a fee."). It is beyond cavil, accordingly, that lay organizations routinely and ethically receive indirect benefit from market rate fee awards, which help finance future law suits and, thereby, partially relieve the organizations from funding litigation otherwise.

Where an ethical objection based on a fee-splitting argument has been raised to the awarding of market value fees, the federal courts have either ignored the argument (*Cf. McLean v. Arkansas Board of Education*, 723 F.2d 45, 47 (8th Cir. 1983)) or clearly indicated that market value fees may be awarded to a lay organization which deposits such fees into a fund maintained exclusively for litigation, as in the instant case. The D.C. Circuit Court of Appeals, in this regard, which went to considerable lengths to articulate the narrowness of the holding on which the MSPB has premised its decision in the case at bar, explicitly left open the possibility in *National Treasury Employees Union v. Department of the Treasury*, 656 F.2d 848, 855 (D.C. Cir. 1981), that "[market rate] allowances would withstand criticism when the monies are directed into a fund for maintenance of a legal services program." In a later case the same court, in granting fees based on a market value formula to the Institute for Public Representation at Georgetown University Law Center, stated that the *NTEU* limitation did not apply to the situation, as in the instant case, where an organization places its attorney's fees in a fund dedicated solely to litigation. *Jordan, supra*, 691 F.2d at 516 n.14.

Most recently in *Devine v. Sutermeister, supra*, moreover, the same court of appeals which ruled market value fees unethical in the case at bar awarded market value fees to a public employee union under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. With *Sutermeister* the petitioned-from decision dictates, consequently, the anomalous result that a market value fee

award to union counsel under the EAJA is ethical, whereas the same fee award under the Reform Act's § 7701(g) to the same counsel for the same services is unethical.

In view of the above, the petitioned-from decision appears to stand alone among federal judicial precedents in concluding that the *indirect* benefit to a lay organization occasioned by a market value fee award is impermissible because of unethical fee-splitting, even where the fee itself is devoted exclusively to litigation purposes. Review by this Court is particularly appropriate, therefore, to resolve the conflicting and irreconcilable positions taken by the Courts of Appeals for the D.C. Circuit and the Federal Circuit in *Jordan v. Department of Justice*, *supra*, and the petitioned-from decision, respectively, and by different panels of the Federal Circuit Court of Appeals in *Sutermeister*, *supra*, and the instant case, respectively, concerning the propriety of market value fee awards to unions which place the awards in funds used exclusively for litigation expenses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 83-1363

CLIFTON L. GOODRICH,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondent.

DECIDED: May 9, 1984

Before FRIEDMAN, DAVIS, and NIES, *Circuit Judges.*

FRIEDMAN, *Circuit Judge.*

This petition to review challenges the amount of an attorney's fee the Merit Systems Protection Board (Board) awarded. The attorney who represented the federal employee was employed by a union. He sought a fee based upon the market value of his services. The Board awarded a fee based upon the union's expenses in providing the services. We affirm.

I

This case grew out of the Department of the Navy's downgrading of petitioner's position. Following proceedings before the Board (which initially held it lacked jurisdiction) and the Court of Appeals for the Third Circuit (which vacated that jurisdictional ruling, *Good-*

rich v. Department of the Navy, 686 F.2d 169 (1982)), the Board overturned the downgrading. The Board held that the downgrading was a reduction in force, which was invalid because the Navy had not followed the procedures necessary to take such action.

Following the Board's action, Mr. Hobbie (the petitioner's attorney) filed with the Board a motion for payment of attorney's fees, as 5 U.S.C. § 7701(g)(1) (1982) authorizes. Mr. Hobbie is a staff counsel with the union of which petitioner is a member. Mr. Hobbie is paid an annual salary by the union, and he did not charge the petitioner a fee for representing him. Mr. Hobbie sought compensation at $75 a hour, which he stated "represents the market hourly rate [in Washington, D.C.] for an attorney of his experience." The total fee he sought was $3,675.

In his motion, Mr. Hobbie stated that in response to the decision in *National Treasury Employees Union v. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981) (supplemental opinion), which held that an attorney employed by a union could not receive legal fees in excess of the union's actual expenses in performing particular services, his union had

> established its Legal Representation Fund into which any attorney fees awarded AFGE [American Federation of Government Employees] attorneys are paid. These monies are under the sole control of the AFGE's General Counsel and are to be used solely for legal work. The fund is maintained as a discrete account and is totally separate and segregable from the union's general treasury.

The Board held that Mr. Hobbie satisfied the statutory requirements for the award of an attorney's fee. It calculated the fee on the basis of the number of allowable hours Mr. Hobbie had expended on the case, multiplied by Mr. Hobbie's hourly salary rate from the union. This

came to $979.32, which the Board doubled to reflect the union's overhead costs. This resulted in a total fee of $1,958.64, which the Board ordered the Navy to pay to the union's Legal Representation Fund.

II

A. Since neither party has questioned or discussed whether the petitioner was "adversely affected or aggrieved" by the Board order awarding the union a lower fee than it sought, we assume that the petitioner has standing to challenge the order under 5 U.S.C. § 7703(a)(1)(1982), as someone within one of those categories.

B. The governing statute, 5 U.S.C. § 7701(g)(1), authorizes the Board to "require payment by the agency involved of reasonable attorney fees incurred by an employee" if the statutory criteria are satisfied (the Board held they were satisfied). The Board has held that lawyer's fees are "incurred by an employee" if they are incurred in his behalf, even though he does not pay them. *O'Donnell v. Department of Interior*, 2 M.S.P.B. 604 (1980).

In determining reasonable attorney's fees under this provision, the Board ordinarily applies the principle that the fee should be based upon the lawyer's customary hourly rate multiplied by the number of hours expended, with any adjustments that are appropriate in light of special factors in the particular case. *Kling v. Department of Justice*, 2 M.S.P.B. 620, 624-28 (1980); *Powell v. Department of the Treasury*, 81 FMSR ¶ 7076 (1981). Where, however, the lawyer is an employee of a union, the Board applies a different standard. In that situation, it limits the fee to the amount the union has expended in providing the services, *i.e.*, the lawyer's salary plus the union's overhead expenses.

The Board took this position in reliance on the *Treasury Employees* case, *supra*. In its supplemental opinion

in that case, the court held that an award of attorney's fees to a union that exceeded the union's expenses in providing legal services to a member would be improper because "the union would profit—perhaps handsomely—on the legal activities of those lawyers under any arrangement whereby market-value fees wend their way into the union's general treasury." The court explained that

> the settled expectation of the union employer and the employed attorneys that all fees recovered belong to the union means that the employing lay organization would capitalize on the attorney's services, reap a profit therefrom, and put the monies thus made to any use it chooses. In the absence of any compelling reason to disregard the ethical considerations implicated—and we discern none here—we believe that an allowance of above-cost fees to the union is inappropriate.

Id. at 853, footnote omitted.

The Board applied this principle to the award of attorney's fees to a union under 5 U.S.C. § 7701(g)(1) in *Powell, supra.* It stated that the "reasoning and the ethical considerations which guided" the court in *Treasury Employees* "are persuasive and are equally applicable to an award of attorney fees under 5 U.S.C. § 7701(g)(1) to union-employed counsel where counsel is obligated by his or her employment agreement to turn the award over to the union employer."

The petitioner does not challenge this rule. He contends, however, that the union's establishment of its Legal Representation Fund, into which all attorney's fees awarded to staff attorneys are paid, warrants an award based upon the market value of the services the union's attorney rendered. He points to the statement in *Treasury Employees* that "perhaps" award of legal fees based on market value "would withstand criticism when the monies are directed into a fund for maintenance of a

legal services program." 656 F.2d at 855, footnote omitted.

In rejecting this argument in the present case, the Board followed its recent decision in *Wells v. Schweiker*, 82 FMSR ¶ 7053 (1982), where it explained:

> Regardless of whether or not petitioner expects to expend the attorney fee awards solely for litigation-related purposes, the fact remains that the application of the market-value formula to the fee award here would allow petitioner to profit from the underlying activities of its attorneys in this matter. The extent of such a profit, as the Administrative Law Judge correctly recognized, would be commensurate with the extent to which such an award would relieve petitioner of the burden of financing its litigation activities through its general revenue funds. The well-established ethical principles recognized in *NTEU* prohibit this result.

Mr. Hobbie stated in his motion for attorney's fees that "[t]he Legal Representation Fund does not contain enough money to pay for all of AFGE's legal work. General funds must also be used." The record contains nothing indicating how this fund actually functions. It does not show what portion of the fund is supplied by the union from its general funds and what portion by fees awarded to the union. At least to the extent the union uses its general funds to pay for the legal services it furnishes to its members, the vice the court of appeals in *Treasury Employees* and the Board in *Powell* found in the payment to the union of a fee based upon the market value of the attorney's services also would exist in such payment under the present fund arrangement. By reducing the amount of its general funds the union is required to use to provide legal services, the payment to the fund of legal fees that exceed the union's expenses

of providing the services would result in the union's indirectly utilizing legal fees for its ordinary expenses.

The petitioner contends that the recent decision of the Supreme Court in *Blum v. Stenson*, No. 81-1374, decided March 21, 1984, supports his position. In that case the Court held that in determining attorney's fees under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (Supp. V 1981), a nonprofit legal service organization was entitled to a fee based upon prevailing market rates rather than its cost in providing the service.

The decision is inapposite because the entire fee in that case went to a nonprofit law office, The Legal Aid Society of New York. In the present case, however, part of the fee would inure to the benefit of a nonlegal organization, the union, and it was for that reason that the Board limited the union's fee to its expenses of rendering the service. Moreover, the suit in *Blum* was brought under a civil rights statute. A major reason for awarding attorney's fees in such cases is to encourage and facilitate the bringing of suit to protect and vindicate those rights. *Cf. Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). There is no comparable public policy to encourage the bringing of suit by federal employees challenging adverse personnel actions against them.

In the circumstances of this case, we cannot say that the Board committed legal error or abused its discretion in limiting the attorney's fee awarded to the expenses the union incurred in providing services. In so holding, we intimate no view on whether a different result might be appropriate if a legal representation fund fully supported the union's legal services program.

The order of the Board awarding the petitioner an attorney's fee of $1,958.64 is

Affirmed.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK REGIONAL OFFICE

Case No. NY03518090128ADD

June 3, 1983

CLIFTON L. GOODRICH

v.

DEPARTMENT OF THE NAVY,
NAVAL WEAPONS STATION EARLE

ADDENDUM DECISION

On February 8, 1983, this presiding official issued a remand decision finding that appellant was downgraded because his duties had gradually eroded over a period of years or, alternatively, that his former position was abolished due to a reorganization. Remand Decision at 2. In either alternative, the agency was required to follow reduction-in-force (RIF) regulations at 5 C.F.R. Part 351, but it did not. *Id.* at 3. Because the agency failed to apply RIF regulations to appellant, the downgrading action was reversed and the agency was ordered to cancel the downgrading retroactive to its effective date. The agency did not file a petition for review. Instead, it submitted a Standard Form 50, Notification of Personnel Action documenting compliance with the initial decision. The Board did not reopen the case, *sua sponte*. Accordingly, the decision became final on March 15, 1983. 5 C.F.R. 1201.113(b) (1983).

Mr. Charles A. Hobbie, a staff counsel with the American Federation of Government Employees (AFGE) filed a motion for attorney fees, which has been accepted as having been timely filed.[1] The agency submitted a responsive pleading opposing the motion. Before the record closed, movant and the agency furnished supplemental responses. The motion has been adjudicated based on the existing record.

The Civil Service Reform Act of 1978, Pub. L. 95-454, as codified in part at 5 U.S.C. 7701(g)(1) (Supp. V 1981) expressly provides that, in appeals in which there is no finding of prohibited discrimination, as here, attorney fees may be awarded to appellant if he establishes that:

1. He is the "prevailing party";

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[1] The deadline for filing the motion was March 25, 1983. *See* 5 C.F.R. 1201.37(b)(2). On March 23, 1983, Mr. Hobbie filed a motion for an eleven-day extension in which to file a perfected attorney fees motion due to his direct involvement in the following cases:

> *Evans v. Department of the Navy*, No. 82-7332, 9th Circuit Court of Appeals (oral argument March 18, 1983); *AFGE v. Weinberger*, No. 82-2149, U.S. District Court for the Eastern District of Pennsylvania (brief due March 25, 1983); *Department of Justice v. FLRA & AFGE*, No. 82-1622 D.C. Circuit Court of Appeals (oral argument March 29, 1983); and *Friedman v. SSA*, FMCS No. 80K/26727 (post-hearing brief due April 6, 1983).

His attorney fees motion was filed on April 4, 1983, ten days after the March 25 deadline. The earlier motion provided a reasonable explanation for the not inordinate delay. Movant need not show utter impossibility in meeting the filing deadline. *Alonzo v. Department of the Air Force*, 4 MSPB 262 (1980). *See also Small v. Department of the Navy*, 6 MSPB 312 (1981).

The agency has not established that it was prejudiced by the delay. Based on all the above, good cause has been shown for granting the motion for an eleven day extension. *See* Order dated April 29, 1983. Accordingly, the attorney fees motion is deemed to be timely filed. *See generally, Phillips v. United States Postal Service*, No. 30-81 (December 23, 1982).

2. He "incurred" attorney fees;

3. An award is "warranted in the interest of justice"; and

4. The fees claimed are "reasonable".

See also Allen v. U.S. Postal Service, 2 MSPB, 582, 586 (1980).

In the instant case, the first requirement has clearly been met. Appellant is the prevailing party, having obtained all the relief sought in petitioning for appeal with the Board, i.e., the agency canceled the downgrading action. *Hodnick v. Federal Mediation and Conciliation Service*, 4 MSPB 431, 434 (1980). *See also, Boyett v. U.S. Customs Service*, MSPB Docket No. NY07528110329 (January 24, 1983).

Concerning the second requirement, the Board will consider fees to have been "incurred" upon a showing by movant that an attorney-client relationship exists pursuant to which counsel rendered legal services on appellant's behalf regarding his appeal. *O'Donnell v. Department of the Interior*, 2 MSPB 604, 610 (1980). *See also Mitchell v. U.S. Postal Service*, 6 MSPB 33 (1981). Here, the record reveals that appellant did not formally designate Mr. Hobbie as his representative under 5 C.F.R. 1201.31 (1983).[2] This does not preclude fees from being incurred provided the requisite attorney-client relationship is established. *Langenbach v. U.S. Postal Service*, MSPB Docket No. NY07520914ADD (July 14, 1982).

The record also shows that Mr. Hobbie is an attorney and that he represented appellant before the United States

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[2] Joseph Gursky represented appellant in the proceedings before the Board. There is no indication in the record that he is an attorney. However, since no fees are being sought for the work he performed, it is unnecessary to determine whether fees were incurred for his services. *Compare, Mitchell, supra*, with *Horton v. U.S. Postal Service*, 7 MSPB 138, 139-140 (1981).

Court of Appeals for the Third Circuit in a petition for review of a final Board order dismissing appellant's appeal for lack of jurisdiction. *See* Movant's affidavit dated May 10, 1983. In specific, he filed a supplemental appellate brief arguing that appellant was demoted due to a gradual erosion of his supervisory duties and, therefore, the agency should have followed RIF procedures. *Id. See also Goodrich v. U.S. Department of the Navy*, 686 F.2d 169, 170, n.6, 171 (3rd Cir. 1982). The Court found the argument was persuasive, vacated the Board order, and remanded the case to the Board for a hearing and a decision on that issue. Remand Decision at 1, *citing*, *Goodrich*, *supra*, at 171, 178. Thus, there is a nexus between Mr. Hobbie's representation before the Third Circuit and the relief appellant petitioned for in his appeal and ultimately obtained when the remand decision became final. Indeed, the relief would not have been granted absent the Court's decision.

In *McBride v. Department of Agriculture*, 4 MSPB 17, 18 (1980), the Board recognized that fees may be incurred even though the services rendered were not before it.[3] Specifically, the Board held that fees may be awarded for services rendered to appellant before the issuance of the agency's final decision provided: (1) the Board has jurisdiction over the appeal; and (2) the services were rendered regarding the appealable agency action. *Id.* at 19 *citing* S. Rep. No. 95-969, 95 Cong., 2d Sess. 60-61 (1978). *See also Wells v. Schweiker*, MSPB Docket No. HQ12050017 (December 6, 1982). The situation presented in *McBride* is analogous to the subject appeal in that Mr. Hobbie performed legal services concerning an appealable RIF action. Also noteworthy is the

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[3] *See also National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1335 (D.C. Cir. 1982), where the D.C. Circuit concluded that, in awarding attorney fees, "compensable time should not be limited to hours expended within the four corners of the litigation."

fact that his services have a significant impact on the outcome of appellant's appeal before the Board. *See generally, Boyett, supra,* at 3-4.

Based on all the above, I find that fees were incurred under section 7701(g)(1) in that movant has established the existence of an attorney-client relationship pursuant to which he rendered legal services on appellant's behalf concerning the subject appeal. Thus, the second requirement has been satisfied.

Regarding the third requirement, the Board in *Allen* has provided direction by setting forth the following non-exhaustive list of circumstances in which attorney fees may be warranted in the interest of justice:

1. Where the agency engaged in a "prohibited personnel practice";
2. Where the agency's action was "clearly without merit," or was "wholly unfounded," or the employee is "substantially innocent" of the charges brought by the agency;
3. Where the agency initiated the action against the employee in "bad faith," including:
   a. Where the agency's action was brought to "harass" the employee;
   b. Where the agency's action was brought to "exert improper pressure on the employee to act in certain ways";
4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced" the employee;
5. Where the agency "knew or should have known that it would not prevail on the merits" when it brought the proceeding.

Id. at 2 MSPB 568; *Lewis v. U.S. Department of the Navy,* 674 F.2d 714 (8tn Cir. 1982).

Here, the record shows that, when Mr. Hobbie appealed to the Third Circuit, the agency had in its possession certain documents indicating that appellant had suffered a substantial reduction in his supervisory duties. Remand Decision at 1-2; *Goodrich*, *supra*, at 175. From this evidence, it appeared to the Court that appellant's downgrading was "due to an erosion away from his position of supervisory and other responsibilities, rather than due to an erroneous classification of his position." *Id.* On remand, appellant gave unrefuted testimony that such an erosion had occurred. Given the agency's possession of the documents, its awareness of appellant's argument before the court, and its failure to produce any rebuttal evidence whatsoever at the subsequent hearing, I find that the agency knew or should have known that it could not prevail on the merits. *See*, *Betz v. Department of Housing and Urban Development*, MSPB Docket No. SF0351010228 (June 11, 1982). *Cf. Brown v. Department of Defense*, MSPB Docket No. DC075209174 (July 1, 1982).

Also, the agency's failure to invoke RIF regulations constitutes gross procedural error. In specific, the agency denied him the procedural protections and substantive entitlements these regulations afford to an employee. Remand Decision at 3, *citing*, *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980). Thus, appellant's rights were severely prejudiced. *Cf. Morrow v. Department of the Army*, MSPB Docket No. DA07528090245ADD (July 26, 1982). Moreover, the error clearly prolonged the proceeding. As indicated above, the agency should have known that it could not prevail when the Third Circuit remanded the case. Yet, it chose to allow the hearing to proceed rather than cancel the downgrading action. Accordingly, the third requirement has been met.

The final prerequisite to an award is that the fees must be "reasonable". 5 U.S.C. 7701(g)(1). In *Kling v. De-*

partment of Justice, 2 MSPB 620, 624-628 (1980), the Board reviewed and analyzed a substantial body of federal case law for guidance in adopting a methodology for determining the amount of a reasonable attorney fee. The Board adopted the approach represented by a line of cases commencing with *Lindy Bros. Builders, Inc. v. American Radiation and Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), because of its relative simplicity of approach and "its greater susceptibility to analysis and proof" in applying section 7701(g)(1). *Kling, supra*, at 636-627; *Powell v. Department of the Treasury*, MSPB Docket No. DC07529903 at 6 (1981). *Lindy* and its progeny recognize that most of the factors for ascertaining a reasonable fee award to an attorney, who is not a salaried union employee, are generally accounted for by two objective variables: (1) the lawyer's customary hourly billing rate; and (2) the number of hours devoted to the case, as modified by other special factors when justified to adjust the result. *Id.*[4]

In *Wells v. Schweiker, supra*, the Board held that, when, as here, a salaried union employee rendered the services in question, the fees should be measured by a "salary-plus overhead" or "cost-plus" formula rather than a "market value" approach because the latter "would provide payment to the union for the unauthorized practice of law." *Id.* at 6, 9, *citing National Treasury Employees Union v. Department of the Treasury*, 656 F.2d 848 (D.C. Cir.1981);[5] *Powell v. Department of the Treasury*,

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[4] The Board noted that other special factors not adequately reflected in the attorney's time and hourly rate, such as quality of professional performance, unusual time constraints, an unusually unpopular cause, and a contingency factor when the attorney has agreed to be paid only if successful, can be applied when justified to adjust the result. *Kling, supra*, at 626.

[5] I am mindful that in *Johnson v. Department of the Treasury*, No. SA-77-CA-5 (W.D. Tex. September 24, 1981) a U.S. District Court ruled that the market-value formula may be applied under

supra. The situation presented in *Wells* is strikingly similar to what occurred here. As in *Wells*, movant is a salaried employee of a federal union, who represented that any attorney fees received will not be directed into the union's general revenues, but will be deposited into a special Legal Representation Fund maintained separately from its general revenue funds. He further represented that all disbursements from the fund will be made only for purposes directly related to the legal representation of the union's members. Movant's motion dated April 4, 1983 at 9-10. The Board in *Wells* found "(T)he application of the market value formula to the fee award here would allow petitioner to profit from the underlying activities of its attorneys in this matter. The extent of such a profit . . . , would relieve petitioner of the burden of financing its litigation activities through its general revenue funds." *Id.* at 8. Accordingly, the Board adopted the cost-plus method for salaried union attorneys under which fees are properly determined "by multiplying the product of the hours reasonably worked times an hourly rate which is based on the attorney's salary, and adding to that product the overhead costs of proving the legal representation.[6]

Since a fee award must not provide a windfall at the expense of the public fisc, *O'Donnell*, *supra*, at 611, the billable hours and hourly rate claimed must be scruti-

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facts similar to the subject appeal. However, the Board in *Wells*, while not specifically addressing *Johnson*, did not find the Court's reasoning to be persuasive. Accordingly, I find that *Wells* is the controlling precedent.

[6] The Board has determined that when a salaried union attorney turns his or her fee award over to the union, the Board will recognize the amount of overhead costs incurred as equivalent to 100 percent of the compensation for the attorney's professional services, unless appellant or the agency shows that such an allowance is substantially excessive or insufficient. *Powell*, *supra*, at 15-16. Movant has represented that he will turn over all attorney fees awarded him to the union.

nized with due care. *Kling, supra*, at 627. Hours may be cut for duplication, padding, or frivolous claims, and fair standards of efficiency and economy of the time may be imposed. *Id.*

In his motion and accompanying affidavit, movant gave the following breakdown of billable hours concerning his supplemental appellate brief and his attorney fee motion:

Date:	Description of Work Performed:	Time (hours):
1982		
May 6	Review Goodrich case record on appeal to MSPB, MSPB initial and final decisions, and briefs filed already by Goodrich and Navy.	3.5
7	Review *Atwell* decision and records of case before court.	1.5
	Research and review reduction-in-force decisions of MSPB and applicable FPM (Federal Personnel Manual); CFR (Code of Federal Regulations); and Navy requirements.	5.5
10	Review FRAP (Federal Rules of Appellate Procedure) and local rules governing form of briefs.	1.0
	Research and draft supplemental statements of issues and case.	3.0
	Research scope of review.	4.0
11	Draft scope of review argument.	3.5
	Draft argument distinguishing *Atwell*.	4.0
12	Draft argument addressing MSPB errors.	3.5
	Revise drafts of brief.	3.0
	Draft tables for brief.	3.0
13	Finalize brief, proofread, and update authorities.	4.0
1983		
April 1	Research and review judicial and MSPB decisions re attorney fees.	3.0
	Draft motion and supporting argument.	2.5
4	Finalize motion and argument, proofread, and file by mail.	4.0
		49.0 TOTAL

Movant's motion, *supra*, and attachments. Because movant specified not only each service he performed but also how long he spent on that particular task, I can readily discern if the billable hours are reasonable. *See International Travel Arrangers v. Western Airlines*, 623 F.2d 1255, 1275 (8th Cir. 1980).[7]

Having found that movant adequately documented the time he spent, the critical issue to resolve is whether the time spent was reasonably necessary. This determination must be made, even though the agency has not interposed an objection to the billable hours being claimed. *Kling*, *supra*, at 627. Movant's claim of 3.5 hours for reviewing the case record does not appear excessive based on my examination of the parties' submissions, the hearing transcript, the initial decision, and the Board's order. Also, this review enabled him to detect and point out to the Third Circuit the omission of documents from the record showing appellant's loss of duties and responsibilities. *Goodrich*, *supra*, at 175. This was a key factor in the Court's decision to vacate the Board's order. *Id.* at 177-178.

Movant's claims of 1.5 hours for reviewing the D.C. Circuit's opinion and the appellate record in *Atwell v. MSPB*, 670 F.2d (D.C. Cir. 1981),[8] one hour for reviewing applicable FRAP and local court rules, and four hours for researching the Third Circuit's scope of review seems both reasonable and highly appropriate. In that regard, the Third Circuit specifically requested that he file a supplemental appellate brief commenting on *Atwell's* effect

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[7] *Contrast Cicero v. U.S. Postal Service*, 4 MSPB 145, 146 (1980) where the Board vacated the addendum decision and remanded the case to the presiding official because the record contained insufficient information to determine whether the hours claimed were reasonable under *Kling*.

[8] In *Atwell*, the Court held that a reclassification downward with retained grade and pay is not an adverse action appealable under 5 U.S.C. 7512 (Supp. V 1981).

on the subject appeal. His thorough research culminated in a persuasive brief. *Goodrich, supra,* at 174-175, 177.

However, movant's claim of 5.5 hours to research applicable regulations and guidance material plus Board decisions appears somewhat excessive. The record does not indicate that he was denied access to such basic research materials by Joseph Gursky, who had represented appellant before the Board. *See* n.2, *supra.* Since movant is required to economize his time, I will deduct one hour from the time claimed, leaving him with 4.5 compensable hours for this research.

Additionally, his claim of 25 hours essentially for drafting, revising and proofreading his brief appears reasonable with two notable exceptions. First, the request for three hours to draft "tables" for the brief strikes me as excessive, absent a showing that circumstances dictated such a time expenditure. Therefore, I will deduct 1.5 hours from this figure. Second, the request for four years to "finalize brief, proofread, and update authorities" seems duplicative considering he has also claimed three hours for draft revisions. In any event, I find that the four hours claimed would represent a failure to economize his time. It is therefore appropriate to deduct two hours from this figure to attain the maximum reasonable time expenditure. Accordingly, he is entitled to 21.5 compensable hours for the aforementioned activities.

Lastly, his claim of 9.5 hours for researching, drafting, proofreading, and revising his 11-page attorney fee motion is justifiable based on my review of this submission and the accompanying attachments.[9] In particular, he gave a textual treatment to the relevant issues raised

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[9] The Board has expressly held that an attorney may be compensated for time spent working on a fee petition. *LaMorge v. Department of Agriculture,* 6 MSPB 125, 126 (1981), *citing Prandini v. National Tea Co.,* 585 F.2d 47 (3rd Cir. 1978).

herein. I also found his arguments on the interest of justice issue were persuasive. Movant's motion at 4-7.

In sum, movant should be compensated for 44.5 hours of work. The penultimate determination is movant's hourly salary rate, the multiplier in computing the fee award. *Wells, supra.*

Movant filed a supplemental affidavit dated May 10, 1983 stating, *inter alia*, that his actual cost to the union in May, 1982 and April, 1983 was $27.38 and $29.86 per hour, respectively. These figures include the union's payments for workman's compensatory unemployment insurance, social security, health insurance, pension, and gross salary. Movant's affidavit at 2-3. The Board, however, has held that the appropriate multiplier is the hourly rate based on his gross annual salary alone. *Powell, supra*, at 14.

In response to an order, he submitted a supplemental affidavit dated May 20, 1983, indicating that his gross hourly salary rate in May, 1982 was $22.05 and increased to $24.17 in April, 1983. Movant's affidavit at 1-2. As already noted, these are the time periods in which the compensable services were performed. The agency did not challenge the hourly rate. Accordingly, the rates are the appropriate multipliers in computing the award.

The final determination is the union overhead costs. This figure may include the payments which the union has made on movant's behalf as stated in his May 10, 1983 affidavit. The Board, however, will normally recognize the amount of overhead costs incurred as equivalent to 100 percent of the compensation for movant's services. *See* n.5, *supra, citing Powell, supra*, at 15-16. Movant has not shown that the union payments alone or coupled with other union overhead expenditures[10] exceeds this

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[10] Such recoverable expenditures may include reasonable photocopying, paralegal expenses, travel and telephone costs, and neces-

allowance. Nor has the agency shown that figure is substantially excessive. Therefore, movant is entitled to the 100 percent allowance in computing his award. *Id.*

Based on all the above, movant is GRANTED attorney fees of $1,958.64, computed as follows:

34 hours at $22.05 per hour =	$	749.70
		+
9.5 hours at $24.17 per hour =	$	229.62
	$	979.32
		+
100 percent overhead allowance	$	979.32
Total	$	1,958.64

Accordingly, the agency is ORDERED to pay Charles A. Hobbie's reasonable attorney fees in the amount of $1,958.64. The agency's check should be made payable to the AFGE Legal Representation Fund.

This addendum decision will become a final decision of the Merit Systems Protection Board on July 8, 1983, 35 days from the date of issuance, unless a petition for review is filed with the Board or the Board reopens the case on its own motion. 5 C.F.R. 1201.113 and 1201.117.

An appropriate official of the agency must furnish this office with evidence of its compliance with this order within ten (10) calendar days of the date the decision and order become final. If the agency files a petition for review (see below), an informational copy of it should be sent to this office for its compliance records.

Any party seeking enforcement of a final decision may file a petition for enforcement with this office. The peti-

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sary supplemental secretarial costs. *O'Donnell, supra,* at 612, *citing, Northcross v. Board of Education,* 611 F.2d 624, 639 (6th Cir. 1979); *Hayes and Miller v. Department of the Air Force,* MSPB Docket No. 07528090220ADD at 8 (February 9, 1983); *Compare, Bennett v. U.S. Department of the Navy,* No. 16-82 (Fed. Cir. February 4, 1983).

tion for enforcement should comply with 5 C.F.R. Section 1201.181(a), be addressed to the Regional Director and explain why the party believes there is noncompliance.

Any party to the proceeding, the Director of the Office of Personnel Management (OPM) and the Special Counsel may file a petition for review.

The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the OPM. The Board may grant a petition for review, after providing an opportunity for response by other parties, when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The petition for review must be filed with the Office of the Secretary, Merit Systems Protection Board, 1120 Vermont Ave., N.W., Washington, D.C. 20419, no later than July 8, 1983. Three copies of the petition must be filed with the Secretary.

Pursuant to 5 U.S.C. 7703(b)(1),[11] appellant may seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit Court no later than 30 days after receipt of the Board's final order or decision. Judicial review of a final order of the Board in a case involving discrimination

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[11] As modified by section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. 1295(a)(9).

under 5 U.S.C. 7702 may be sought in the appropriate United States District Court.

In court cases involving issues of discrimination which were brought before the Board under 5 U.S.C. 7702, appellants have the right to request the courts to appoint attorneys to represent them and to request that prepayment of fees, costs or security be waived. 42 U.S.C. 2000e-5(f)(1).

Administrative review of final orders in cases involving discrimination brought under 5 U.S.C. 7702 may be sought, pursuant to 5 U.S.C. 7702(b), by filing a petition for consideration with the Equal Employment Opportunity Commission, Office of Review and Appeals, 2401 E St., N.W., Washington, DC 20506, within 30 days of the date the decision of the Board becomes final.

The agency responsible for taking the action in issue is the proper respondent and must be named as a party whenever judicial review or consideration by the Equal Employment Opportunity Commission is sought. The Board is not the proper respondent in such case and should not be named. 5 U.S.C. 7703(a)(2).

For the Board:

Dated: June 3, 1983

/s/ Arthur Joseph
ARTHUR JOSEPH
Presiding Official

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 83-1363

CLIFTON L. GOODRICH,
Petitioner,

v.

DEPARTMENT OF THE NAVY,
Respondent

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: Affirmed.

ENTERED BY ORDER
OF THE COURT

/s/ George E. Hutchinson
Clerk

DATED May 9, 1984
Petition for rehearing,
Denied, July 12, 1984,
Suggestion for Rehearing,
Declined, July 12, 1984.

Issued as a Mandate: July 20, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 83-1363

CLIFTON L. GOODRICH,
Petitioner,

v.

THE DEPARTMENT OF THE NAVY,
Respondent.

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ George E. Hutchinson
GEORGE E. HUTCHINSON
Clerk

July 12, 1984

Date

cc: Charles A. Hobbie
M. Susan Burnett

Office - Supreme Court, U.S.
FILED
DEC 21 1984
ALEXANDER L. STEVAS
CLERK

(2)

No. 84-577

In the Supreme Court of the United States

OCTOBER TERM, 1984

CLIFTON L. GOODRICH, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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20pp

QUESTION PRESENTED

Whether the court of appeals correctly held that the Merit Systems Protection Board did not commit legal error or abuse its discretion in determining that the award of attorney fees to a union under 5 U.S.C. 7701(g)(1) in connection with its representation of a federal employee should be limited to the expenses the union incurred in providing the services.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-577

CLIFTON L. GOODRICH, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 733 F.2d 1578. The decision of the Merit Systems Protection Board (Pet. App. 7a-12a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a) was entered on May 9, 1984. A petition for rehearing was denied on July 12, 1984 (Pet. App. 23a). The petition for a writ of certiorari was filed on October 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner's federal civil service position with the Department of the Navy was downgraded effective January 27, 1980 (Pet. App. 1a; 686 F.2d 169, 170 (3d Cir. 1982)). Petitioner appealed the agency action to the Merit Systems Protection Board (MSPB), which dismissed his appeal for lack of jurisdiction (Pet. App. 1a). The United States Court of Appeals for the Third Circuit vacated the decision and remanded the case to the MSPB. On February 8, 1983, the presiding official issued a decision finding that petitioner had been downgraded because his duties had gradually eroded over a period of years or, alternatively, that his former position was abolished due to a reorganization. The presiding official concluded that, under either alternative, the Department of the Navy had erroneously failed to apply reduction-in-force procedures, and he therefore ordered the Department to cancel the downgrading (Pet. App. 7a).

2. a. On April 4, 1983, petitioner's attorney, Charles Hobbie, filed a motion with the MSPB for payment of attorney fees (Pet. App. 8a). Mr. Hobbie is a staff counsel with the union of which petitioner is a member, the American Federation of Government Employees (AFGE) (*id.* at 2a). In the application for attorney fees, Mr. Hobbie sought compensation to be paid to AFGE at the rate of $75 per hour for his services, which, he stated, "represents the market hourly rate for an attorney of his experience" (*ibid.*). The total fee sought by AFGE through Mr. Hobbie was $3,675 (*ibid.*). Mr. Hobbie represented that the AFGE had "establish[ed] [a] Legal Representation Fund into which any attorney

fees awarded AFGE attorneys are paid" and that "[t]hese monies are under the sole control of AFGE's General Counsel and are to be used solely for legal work" (*ibid.*). He conceded, however, that "[t]he Legal Representation Fund does not contain enough money to pay for all of AFGE's legal work. General funds must also be used" (*id.* at 5a).

b. The governing statute, 5 U.S.C. 7701(g)(1), authorizes the MSPB to "require payment by the agency involved of reasonable attorney fees incurred by an employee" if the employee is the prevailing party and the MSPB determines that "payment by the agency is warranted in the interest of justice * * *."[1] In determining the amount of attorney fees to be awarded, the MSPB ordinarily applies the principle that the fees should be based upon the attorney's customary hourly rate multiplied by the number of hours expended, with any adjustments that are appropriate in light of special factors in the particular case. *Powell* v. *Department of the Treasury*, 8 M.S.P.B. 21 (1981); *Kling* v. *Department of Justice*, 2 M.S.P.B. 620, 624-628 (1980). However, in two prior decisions relied upon by the MSPB in this case, the MSPB held that any award of attorney fees to a union should be calculated on the basis of the union's expenses in supplying the legal services rendered. *Wells* v. *Schweiker*, 12 M.S.P.B. 329 (1982); *Powell* v. *Department of the Treasury*, *supra*. The MSPB adopted this approach for two reasons.

First, the MSPB concluded that when a salaried union employee renders legal services, the fee paid

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[1] The MSPB has held that attorney fees are "incurred by an employee" if they are incurred on his behalf, even though he does not pay them. *O'Donnell* v. *Department of Interior*, 2 M.S.P.B. 604 (1980).

to the union should be measured by a "salary-plus-overhead" or "cost-plus" approach rather than attempting to assign a market value to the lawyer's services, because the latter method would result in the payment of excess fees to the union and thus raise concerns about the unauthorized practice of law. See *Powell*, 8 M.S.P.B. at 25-28. In *Wells*, the MSPB concluded that the maintenance of a segregated legal fund by the union did not resolve this ethical concern, at least where payment into such a fund would reduce the amount of its general funds the union must devote to providing legal services, because such a fund is simply a means by which the union could do indirectly what it could not do directly. 12 M.S.P.B. at 331.

Second, the MSPB rejected market value awards to unions because to award more to a union than is available under a "salary-plus-overhead" or "cost-plus" approach would provide the union with a windfall profit for the performance of legal services. This, the M.S.P.B. concluded, would contravene the congressional purpose simply to "make whole" employees who have suffered losses in salary and benefits as the result of improper personnel actions. *Wells*, 12 MSPB at 331-333.

c. In an addendum decision issued on June 3, 1983, the MSPB held that AFGE satisfied the statutory requirements for an award of attorney fees (Pet. App. 7a-21a). In accordance with its prior decisions in *Powell* and *Wells*, the MSPB calculated the fee on the basis of the number of allowable hours Mr. Hobbie had expended on the case, multiplied by his hourly rate of salary from the union (*id.* at 2a, 12a-14a). This formula yielded a total fee of $979.32 for 43.5 hours. Again in accordance with its prior decision in *Powell*, the MSPB then increased this

amount by 100% to reflect the union's overhead costs (*id.* at 2a-3a, 14a n.6, 18a-19a). This resulted in a total fee award of $1,958.64, which the MSPB ordered the Navy to pay to the AFGE's Legal Representation Fund (*id.* at 19a).

3. On petition for review pursuant to 5 U.S.C. 7703(b)(1), the United States Court of Appeals for the Federal Circuit held that the MSPB did not commit legal error or abuse its discretion in basing the attorney fee award on the expenses the union incurred in providing the services (Pet. App. 6a). The court of appeals held that placement of the attorney fees in the union's Legal Representation Fund did not resolve the ethical problem inherent in paying the union more than that amount, explaining (Pet. App. 5a-6a):

> At least to the extent the union uses its general funds to pay the legal services it furnishes to its members, the vice the court of appeals in [*National Treasury Employees Union* v. *Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981)] and the Board in *Powell* found in the payment to the union of a fee based upon the market value of the attorney's services also would exist in such payment under the present fund arrangement. By reducing the amount of its general funds the union is required to use to provide legal services, the payment to the fund of legal fees that exceed the union's expenses of providing the services would result in the union's indirectly utilizing legal fees for its ordinary expenses.

However, the court of appeals expressly "intimate[d] no view on whether a different result might be appropriate if a legal representation fund fully supported the union's legal services program" (*id.* at 6a).

In addition, the court of appeals rejected petitioner's argument that this Court's decision in *Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), mandated a different result. First, the court observed that in *Blum*, the entire fee went to a nonprofit law office, the Legal Aid Society of New York; in this case, by contrast, part of the fee would inure to the benefit of a nonlegal organization, the union. Second, the court reasoned that public policy favors awards of attorney fees in cases such as *Blum* in order to encourage and facilitate the bringing of suits to protect and vindicate civil rights; the court found no comparable public policy to encourage the institution of suits by federal employees challenging adverse personnel actions taken against them. Pet. App. 6a.

ARGUMENT

The court of appeals in this case concluded that the Merit Systems Protection Board did not commit legal error or abuse its discretion in calculating an award of attorney fees under the special statute applicable in MSPB proceedings, 5 U.S.C. 7701(g)(1), on the basis of the expenses actually incurred by the union in furnishing the legal services. That decision, rendered by the court of appeals in which Congress vested exclusive jurisdiction to review MSPB decisions, is correct and does not conflict with any decision of this Court or of another court of appeals. Further review by this Court is not warranted.

1. The issue of the award of attorney fees in this case is one peculiarly within the competence of the MSPB to resolve. Section 7701(g)(1) permits an award of fees by the MSPB, not the courts, and it is intended principally to compensate for legal services rendered in administrative proceedings. See *Olsen* v. *Department of Commerce*, 735 F.2d 558, 560 (Fed.

Cir. 1984). In addition, Section 7701(g)(1) does not apply in cases involving discrimination. In discrimination cases, Congress has specifically directed in 5 U.S.C. 7701(g)(2) that the payment of attorney fees shall be in accordance with the standards prescribed under Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). Thus, Section 7701 (g)(1), at issue here, applies only in administrative appeals in adverse action and other routine personnel cases that Congress has placed within the exclusive jurisdiction of the MSPB.

Moreover, this is a case in which "Congress has not directly addressed the precise question at issue" (*Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5)—the appropriate award of attorney fees under Section 7701(g)(1) where an employee was represented in administrative proceedings by salaried union counsel. The general terms of the text of Section 7701(g)(1) do not focus on that question, and, as petitioner concedes (Pet. 9-11), the legislative history is silent on that question as well. The appropriate inquiry therefore is "whether the agency's answer is based on a permissible construction of the statute" (*Chevron U.S.A., Inc.* v. *NRDC*, slip op. 5). In undertaking that inquiry, it is well settled that the construction of a statute by the agency charged with its execution should be sustained by a court unless there are "compelling indications" that it is wrong. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).[2] There are no such com-

[2] The Federal Circuit has applied these principles of deference to administrative construction in reviewing the MSPB's implementation of its statutory authority to direct the payment of attorney fees. See *Bennett* v. *Department of the Navy*, 699 F.2d 1140, 1146 (1983); *Sterner* v. *Department of the Army*, 711 F.2d 1563 (1983).

pelling indications here. To the contrary, the MSPB's approach is fully consistent with, and indeed is affirmatively supported by, the terms of Section 7701 (g)(1). Surely, an award that fully reimburses the union for its actual representation expenses yet does not trench on countervailing ethical concerns or result in a windfall to the union is a "reasonable" one, is tied to the fees actually "incurred," and "is warranted in the interest of justice." By the same token, the MSPB reasonably could conclude that an award in excess of that amount would not be appropriate under these same statutory standards. Cf. *Shepard* v. *NLRB*, 459 U.S. 344, 349, 352 (1983). Thus, the MSPB's choice " 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute,' " and the court of appeals properly declined to disturb it. *Chevron U.S.A. Inc.* v. *NRDC*, slip op. 6-7, quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961).

2. Petitioner contends (Pet. 8-13), however, that the union is entitled to recover fees on the same basis as if this case arose under laws prohibiting discrimination. From this premise, and relying on this Court's recent decision in *Blum* v. *Stenson*, No. 81-1374 (Mar. 21, 1984), he argues that the award of fees should have been based on prevailing market rates. This argument is without merit.

In *Blum* v. *Stenson*, the award of fees was governed by the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. The legislative history of that particular statute established that Congress intended the award of fees to be based on prevailing market rates. See slip op. 5-8. Here, by contrast, as petitioner concedes (Pet. 9-11), the legislative history is silent regarding the manner in which fee awards under Section 7701(g)(1) should be com-

puted. Congress thus left it to the MSPB to fill in this and other gaps in the remedial scheme, taking into account the various statutory policies embodied in the Civil Service Reform Act. See *Chevron U.S.A. Inc.* v. *NRDC*, slip op. 4-5.

Despite this silence in the text and legislative history of Section 7701(g)(1), petitioner argues that Congress nevertheless intended to require the MSPB to follow the standards under the civil rights laws. The difficulty with this argument is that where Congress intended to require the MSPB to be bound by those standards, it expressly so provided. In Section 7701(g)(2), Congress provided that if an employee is the prevailing party and the decision is based on a finding of discrimination, "the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k))." Congress's failure to incorporate those same standards in Section 7701(g)(1) indicates a deliberate congressional determination that the MSPB should *not* be rigidly bound by those standards in adverse action and other routine personnel cases arising under the civil service laws. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). See *Hodnick* v. *Federal Mediation and Conciliation Service*, 4 M.S.P.B. 431, 433 (1980).

There are sound reasons for the distinction Congress drew. A principal rationale for the award of attorney fees in cases of discrimination is to encourage and facilitate the institution of suits to protect and vindicate the civil rights at issue. The plaintiff in such a case serves as a "private attorney general." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). See *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983); *id.* at 442-446 (Brennan, J.,

concurring and dissenting); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416-417 (1978). The award of fees based on a prevailing market rate standard can be viewed as a necessary incentive to the bringing of such suits. See, *e.g.*, *Copeland* v. *Marshall*, 641 F.2d 880, 899 (D.C. Cir. 1980) (en banc).

However, as the court of appeals recognized in this case, there is no comparable congressional policy of broadly encouraging the institution of legal measures by federal employees challenging adverse personnel actions against them where those actions were taken on grounds other than discrimination. Thus, when compared to attorney fee provisions under the civil rights laws, the attorney fee provision in Section 7701 (g)(1) has the more modest goal of making employees whole for losses sustained by the personnel actions, and only in circumstances where an award is warranted in the interest of justice. Pet. App. 6a; *Wells* v. *Schweiker*, 12 M.S.P.B. at 330 n.2, 332-333; *Powell* v. *Department of the Treasury*, 8 M.S.P.B. at 27 & n.5; *O'Donnell* v. *Department of Interior*, 2 M.S.P.B. 604, 611 (1980). See also *Gragg* v. *United States*, 717 F.2d 1343, 1345-1346 (Fed. Cir. 1983); *Ramos* v. *United States*, 683 F.2d 396, 398-399 (Ct. Cl. 1982). The award of attorney fees in this case is fully consistent with this make-whole policy.[3] The District of Columbia Circuit drew a similar distinction between the antidiscrimination statutes and the

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[3] Furthermore, an award exceeding the union's actual cost of rendering legal services often would not be necessary to induce the union to prosecute suits on behalf of the employees it represents, because the union may have an independent responsibility to do so (cf. *Vaca* v. *Sipes*, 386 U.S. 171 (1967)) and its staff of salaried attorneys is assembled for that purpose.

Privacy Act of 1974 (5 U.S.C. 552a), observing that the latter Act "lacks any comparable background" and that its attorney fee provision "has the comparatively modest function of removing disincentives to the prosecution of individual actions." *NTEU* v. *Department of the Treasury*, 656 F.2d 848, 855 (D.C. Cir. 1981).

3. As the Federal Circuit also recognized (Pet. App. 3a-6a), the MSPB's decision in this case is supported by relevant ethical considerations and case law addressing those considerations. In *Powell* v. *Department of the Treasury*, *supra*, the MSPB relied upon the District of Columbia Circuit's decision in *NTEU* v. *Department of the Treasury*, *supra*, in concluding that the amount of the fee awarded under 5 U.S.C. 7701(g)(1) should be determined by the union lawyer's salary plus overhead expenses. See 8 M.S.P.B. at 25-28. In *NTEU*, the court explained that an award in a greater amount would violate the Code of Professional Responsibility (656 F.2d at 851-852 (footnotes omitted)):

> Quite conspicuously, the Code's strictures on the attorney's professional alliances strongly exert their influence here. Lawyers are free to accept employment by an organization offering a prepaid legal services plan to its members, but only if "[s]uch organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers . . . ." This restriction is closely related to two more of the Code's most fundamental prohibitions. Attorneys may not split fees with laymen or lay organizations, or enable them to engage in the unauthorized practice of law. Courts and bar groups alike have repeatedly endorsed these ethical maxims. We, too,

> recognize their inestimable value as safeguards against the imposition of incompetent and irresponsible law practice on the public.

See also *Munsey* v. *Federal Mine Safety & Health Review Commission*, 701 F.2d 976, 977 (D.C. Cir. 1983); *Wilderness Society* v. *Morton*, 495 F.2d 1026, 1037 (D.C. Cir. 1974) (en banc), rev'd on other grounds *sub nom. Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Petitioner did not challenge the legitimacy of these ethical considerations in the court of appeals (see Pet. App. 4a) and does not appear to do so in this Court (see Pet. 14-17).

As the MSPB subsequently concluded in *Wells* v. *Schweiker*, these ethical concerns are not eliminated merely because the union channels its funding of legal representation activities through a separate account, since the payment of excess attorney fee awards into that account would relieve the union of its responsibility for financing a portion of its litigation out of general revenues. 12 M.S.P.B. at 330 n.2.[4] The court

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[4] In *NTEU*, the court expressly refrained from deciding whether the ethical problem presented by payment of market value attorney fee awards to unions would be resolved if the monies were directed to a fund for maintenance of a legal services program. 656 F.2d at 855. Petitioner asserts (Pet. 16) that this question was settled in *Jordan* v. *United States Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982). *Jordan* arose under the Freedom of Information Act. The district court denied an award of attorney fees for work performed by the legal staff of the Institute for Public Representation at Georgetown University Law Center because the application was not supported by appropriate documentation. The court of appeals reversed and, in passing, mentioned the *NTEU* decision in a footnote. 691 F.2d at 516 n.14. The court there simply stated that it "assume[d]" for purposes of the appeal that, should the Institute share in any attorney fee award beyond recoupment of its own expenses, it would maintain a

of appeals in this case was careful to point out, however, that a different result might obtain if a separate legal representation fund fully supported the union's legal services program (Pet. App. 6a).

Since a portion of AFGE's legal activities is furnished through use of the union's general revenues (see page 3, *supra*), payment of fees to the union on a market value basis would reduce the amount of general funds the union is required to expend to provide legal services for its members. Accordingly, the MSPB reasonably chose to follow its prior ruling in *Wells* in the circumstances of this case.[5]

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fund exclusively for litigation, into which its share would be deposited. The court noted that, in *NTEU*, the question whether such a separate fund would resolve the ethical questions was not presented. *Ibid.*

The *Jordan* decision does not make clear the fee relationship between the Institute and the attorneys representing Mr. Jordan or whether payment would be made to the Institute or directly to the lawyers. In any event, the question of a separate account was not presented in *Jordan*, just as it was not in *NTEU*, and we therefore cannot assume that the court intended to resolve it in so casual a manner in a footnote, since to do so would sanction a possible circumvention of the ethical concerns raised in *NTEU*.

In *Johnson* v. *Department of the Treasury*, No. SA-77-CA-5 (W.D. Tex. Sept. 24, 1981), an unpublished decision to which petitioner also refers (Pet. 8, 13), the district court held, without extended discussion, that a segregated litigation fund resolved the ethical problem identified by the District of Columbia Circuit in *NTEU*. However, that award apparently was not at issue on appeal. *Johnson* v. *Department of the Treasury*, 700 F.2d 971, 974 n.6 (5th Cir. 1983).

[5] Petitioner cites (Pet. 13, 14) the Federal Circuit's decision in *Devine* v. *Sutermeister*, 733 F.2d 892 (1984), in support of the proposition that attorney fees may be awarded to a lay organization on a market value basis. That case, however, involved an award by the Federal Circuit itself

It again should be borne in mind that this case does not involve an award of attorney fees to be paid to a union under a civil rights statute, including 5 U.S.C. 7701(g)(2). In such a case, it would be necessary to consider whether Congress, in determining that fees ordinarily should be awarded on the basis of the prevailing market rate, had overridden the ethical concerns that otherwise would weigh against such an arrangement.[6] But however that question might be resolved, there is no indication in the text or sparse legislative history of 5 U.S.C. 7701(g)(1) of a congressional intent to displace these established ethical restraints here. To the contrary, Section 7701(g)(1) authorizes the MSPB to require an agency to pay attorney fees to a prevailing federal employee only where "warranted in the interest of justice * * *." As a result, the MSPB did not abuse its discretion by taking ethical considerations into account in declining to require a windfall award here.

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under the Equal Access to Justice Act, 28 U.S.C. 2412, not an award by an administrative agency under a special statute it is charged with administering. Moreover, the ethical questions considered in *NTEU* and in the instant case were not addressed. The other decisions cited by petitioner (Pet. 7-8) likewise involved other statutes and, with one exception (see note 4, *supra*), did not address the ethical concerns. Indeed, in *Crawford* v. *American Federation of Government Employees*, 576 F. Supp. 812 (D.D.C. 1983), the attorney fees apparently were awarded under Fed. R. Civ. P. 37 to the union as a *party*, not for services rendered by its attorneys. 576 F. Supp. at 816.

[6] *Blum* v. *Stenson* did not raise these ethical concerns, because the attorney fees were to be paid to the Legal Aid Society of New York, a nonprofit legal organization. Slip op. 3 n.3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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